United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1304

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P/S

To be argued by
RICHARD J. HOSKINS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1304

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK EVANS, a/k/a "FREDERICK PASEKA",
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Frank Evans appeals from an order of the United States District Court for the Southern District of New York filed August 12, 1975, by the Honorable Inzer B. Wyatt, United States District Judge, denying his motion to dismiss superseding Indictment 75 Cr. 562 on grounds of double jeopardy.

Evans is presently free on bail awaiting trial on the superseding indictment.

Statement of Facts

On February 21, 1975, a one-count indictment, 75 Cr. 176, was filed, charging Evans with the possession of travelers checks which had been stolen from a bank, knowing that they had been so stolen. 18 U.S.C. § 2113(c).

On May 1, 1975 Evans withdrew his earlier plea of not guilty to the indictment and pleaded guilty. During the allocution, Evans said that he knew that the travelers checks he had possessed were stolen, but he did not know that they had been stolen from a bank (Minutes of May 1, 1975, App.* D-5-6). The Court accepted the plea and set a sentencing date.

Although defense counsel, the Assistant United States Attorney, and the Court were apparently unaware of it at the time, such specific knowledge is clearly an essential element of the offense. E.g., *United States* v. *Tavoularis*, 515 F.2d 1070, 1074 (2d Cir. 1975). A few days after the entry of the plea, defense counsel called the Assistant United States Attorney in charge of the case and suggested that the plea had been "defective" in view of the statute's requirement of knowledge that the stolen property came from a bank. The Assistant subsequently communicated his agreement, as well as his intention to seek a superseding indictment, to defense counsel and to Judge Wyatt's law clerk.**

On June 9, 1975 a superseding indictment, 75 Cr. 562, was filed, charging Evans with receiving travelers checks which were part of interstate commerce, knowing that they were stolen, in violation of 18 U.S.C. § 2315.

On June 19, 1975, prior to sentence or entry of a judgment of conviction on the original indictment, the Court, finding that the guilty plea to that indictment had been defective on the ground counsel suggested, set aside the plea of guilty and directed the entry of a plea of not guilty (Minutes of June 19, 1975, App. E-8). On the

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* "App." refers to Appellant's Appendix; "Br." refers to Appellant's Brief.

** Affidavit of Assistant United States Attorney Richard J. Hoskins, filed August 11, 1975, in 75 Cr. 562.

same day, Evans entered a plea of not guilty to the superseding indictment (App. E-4).

Thereafter, Evans moved to dismiss the superseding indictment on the ground that it violated his double jeopardy protection under the Fifth Amendment. On August 11, 1975, Judge Wyatt denied the motion. Also on August 11, 1975, the Government filed an order of *nolle prosequi* with respect to the original indictment.

From the order denying his motion to dismiss the superseding indictment Evans has taken this appeal.

ARGUMENT

POINT I

The appeal should be dismissed because the order appealed from was not a "final decision" within the meaning of 28 U.S.C. § 1291(a).

This appeal is brought pursuant to Title 28, United States Code, Section 1291(a), which confers on this Court jurisdiction only of appeals from "final decisions of the district courts of the United States. . . ." The Government submits that this appeal is not from a "final decision" of the District Court and does not qualify as an exception to the rule of § 1291(a).

This Court has repeatedly and unequivocally held that an order denying a motion to dismiss an indictment—even if based on a constitutional claim—is not appealable. *United States* v. *Garber*, 413 F.2d 284, 285 (2d Cir. 1969); *United States* v. *Foster*, 278 F.2d 567, 568-69 (2d Cir.), *cert. denied*, 364 U.S. 834 (1960); *United States* v. *Golden*, 239 F.2d 877, 878-79 (2d Cir. 1956); *see also*,

United States ex rel. Rosenberg v. *United States District Court*, 460 F.2d 1233 (3d Cir. 1972). Such orders do not constitute a "final decision" in a criminal case from which an appeal may be taken. See *Parr* v. *United States*, 351 U.S. 513 (1956); *Berman* v. *United States*, 302 U.S. 211 (1937); see also *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Cogen* v. *United States*, 278 U.S. 221 (1929); *Heike* v. *United States*, 217 U.S. 423 (1910).

To be sure, this Court has found jurisdiction to entertain an appeal prior to retrial on a double jeopardy issue in *United States* v. *Beckerman*, 516 F.2d 905, 906-07 (2d Cir. 1975), where the defendant had been tried once, the case submitted to the jury, and the jury eventually discharged after reporting a deadlock. The Government submits, however, that that holding should be limited to its facts, the situation where the defendant has been put to the vexation and expense of one trial and will have to go through it all again if his appeal is not heard prior to the retrial.* Where, as here, the claim rests on events occurring prior to any trial, the general rule should prevail that double jeopardy claims, like others, must await a final judgment before appeal is permitted.

It has been established at least since *Rankin* v. *The State*, 11 Wall. (78 U.S.) 380 (1870), that the fact that a petitioner raises an issue of double jeopardy creates no exception to the rule that only final judgments are a predicate for appeal. In *Rankin*, the Supreme Court refused to hear petitioner's double jeopardy claim even though he was about to be tried in a State tribunal for offenses of which he had allegedly been earlier acquitted. Similarly, in *Heike* v. *United States*, 217 U.S. 423, 433 (1910), the Supreme Court held:

> "It may thus be seen that a plea of former conviction under the constitutional provision that no

* "The right will be invaded if an accused . . . is called upon to suffer the pain of *two trials*." *Id.* at 906 (emphasis supplied.)

> person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again."

In *Heike*, the defendant claimed that he was about to be tried for offenses as to which the Government had earlier granted him complete immunity. Nonetheless, the Court held that appeal must await the outcome of the trial and the entry of judgment.*

Not only are the *Heike* and *Rankin* decisions still good law,** but the Supreme Court has more recently indirectly affirmed that double jeopardy claims are no exception to the requirement of a final decision. In *Carroll* v. *United States*, 354 U.S. 394, 403 (1957), the Court noted that *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a civil case relied on by this Court in *Beckerman*, did recognize a "small class" of non-final decisions from

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* It is true that the statute under which appeal was taken in *Heike*, 26 Stat. 826, c. 517, § 5 (March 3, 1891), did not use the term "final decision." However, the Court noted that prior decisions of the Supreme Court had restricted appeals to "cases in which there had been a final judgment," *id.* at 428, and found it to be the "settled practice of this court that a case . . . is only to be reviewed here after final judgment." *Id.* at 429. As a consequence, subsequent cases have viewed *Heike* as requiring "final decision" for appeal. *See, e.g., Corey* v. *United States*, 375 U.S. 169, 174 (1963); *Parr* v. *United States*, 351 U.S. 513, 517 (1956); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 123-24 (1945).

** *See, e.g., Corey* v. *United States, supra; Parr* v. *United States, supra; United States* v. *Golden*, 239 F.2d 877, 879 (2d Cir. 1956).

which immediate appeal might be taken. However, the Court said:

> "The instances [of interlocutory appeal] in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle*, 342 U.S. 1."

In view of this rather clear line of Supreme Court authority, it is not surprising that this Court prior to *Beckerman* refused to allow interlocutory appeals on double jeopardy issues. *United States* v. *Ford*, 237 F.2d 57, 67 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957). In *Ford*, the trial court first directed a verdict of acquittal as to a count of the indictment on which the trial jury had deadlocked, then vacated the verdict of acquittal. Defendant argued on appeal that retrial on that count would subject him to double jeopardy. This Court held:

> "Since the order [vacating the directed verdict of acquittal] is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed."

It is true that *Ford* was later vacated as moot by order of the Supreme Court, as a result of defendant's death on October 6, 1957. However, while the decision would concededly be ineffective for purposes of *res judicata* or collateral estoppel, *United States* v. *Munsingwear*, 340 U.S. 36 (1950), the Government submits that since the event causing the mootness occurred nine days after this Court rendered its opinion, the considered judgment of this

Court in the controversy then before it is not without precedential value on the issue of law decided.

In *Gilmore* v. *United States*, 264 F.2d 44, 46-47 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959), cited with approval by this Court in *United States* v. *Kaufman*, 311 F.2d 695, 699 (2d Cir. 1963), the Fifth Circuit set forth the reasons for not permitting interlocutory appeals on double jeopardy claims:

> ". . . But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, *i.e.*, a constitutional one, does not distinguish appellate review of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters, as for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This is so even though at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.C.A. § 1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense. Until Congress does so, the individual affected is witness

> to the fact that, 'Bearing the discomfiture and the cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States*, 1940, 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L. Ed. 783.
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> "The Constitutional right or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term 'final decision' into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review."

Accord, *United States* v. *Bailey*, 512 F.2d 833 (5th Cir. 1975). *But see United States* v. *Lansdown*, 460 F.2d 164, 170-72 (4th Cir. 1972); *United States* v. *DiSilvio*, 520 F.2d 247 (3d Cir. 1975). However, even *Lansdown* permitted interlocutory appeal only in a situation where denial would have subjected defendant to "the embarrassment, expense, anxiety and insecurity involved in the *second* trial." 460 F.2d at 171 (emphasis supplied), and in *DiSilvio* the petitioner had already been tried once.

The Government submits that the impressive authority against interlocutory appeal, both for constitutional issues in general and double jeopardy issues in specific, requires that such appeals be permitted only where the defendant has actually experienced the rigors of one trial and seeks to avoid a second one. This Court in *Beckerman* was "obviously and properly influenced by the fact that the first trial had proceeded to verdict." *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973). *Accord, United States* v. *Gentile*, Dkt. No. 75-1248 (2d Cir., October 22, 1975) slip op. at 247 n. 2. That consideration, given weight in *Somerville* and *Gentile*, is absent in the instant case and effectively distinguishes it from *Beckerman*.

Accordingly, the appeal should be dismissed.

POINT II

Since the original and superseding indictments charge separate and distinct offenses, prosecution under both indictments would have been consistent with the double jeopardy clause.

The double jeopardy clause of the Fifth Amendment to the Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In the instant case, the original and the superseding indictments charge separate and distinct offenses, so that even if the defendant were prosecuted under both indictments, the double jeopardy clause would not be violated. In *Blockburger* v. *United States*, 284 U.S. 299 (1932), the defendant had been convicted of two counts of violating Federal narcotics laws, arising out of a single sale at one time to one purchaser. The two counts charged the sale under two statutes, one alleging the sale not in or from the original stamped package, and the other alleging the sale not in pursuance of a written order of the purchaser. The defendant argued that he had committed but one offense and that he should not have been sentenced to consecutive terms for the two counts. The Supreme Court disagreed:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed." *Id.* at 304.

The Supreme Court reaffirmed the *Blockburger* decision in a carefully considered opinion by Mr. Justice Frankfurter in *Gore* v. *United States*, 357 U.S. 386 (1958). There, the defendant appealed from three consecutive sentences stemming from a single sale of drugs violating three statutory provisions: sale not in pursuance of a proper written order of the purchaser; sale not in or from the original stamped package; and sale with knowledge of illegal importation. In affirming defendant's sentences, the Court said:

> "'The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." *Id.* at 389.

Addressing the double jeopardy issue, the Court made the following observations:

> "Finally, we have had pressed upon us that the *Blockburger* doctrine offends the constitutional prohibition against double jeopardy. If there is anything to this claim, it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive to the application of the historic safeguard of double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority." *Id.* at 392.

The controlling weight of *Blockburger* and *Gore* in cases such as the instant one has been acknowledged by this Court and others. *United States* v. *Leibowitz*, 420 F.2d 39, 42-43 (2d Cir. 1969). *See also, United States* v. *Wilder*, 463 F.2d 1263, 1265-67 (D.C. Cir. 1972);

Vincent v. *Mosely*, 453 F.2d 1218, 1219 (8th Cir.), *cert. denied*, 406 U.S. 975 (1972); *Akin Distributors of Florida, Inc.* v. *United States*, 399 F.2d 306, 307 (5th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969). The test is not whether the offenses arise out of the same act or transaction * but whether they are the same both in law and fact. *United States* v. *McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Nathan*, 476 F.2d 456, 458-59 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

It is beyond serious dispute that the two indictments in the present case involve charges which are at least as distinct and separate as the charges involved in *Blockburger* and *Gore*. To be sure, both indictments here charge the possession of travelers checks, but the superseding indictment requires proof that the checks were

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* "The Supreme Court has not adopted the 'same transaction' test advocated by Justice Brennan in his concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436, 449, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)." *United States* v. *Wilder*, *supra*, 463 F.2d at 1266 n.9. While Judge Friendly has recently warned that "unless prosecutors take to heart the recommendation for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade," *United States* v. *Cioffi*, 487 F.2d 492, 497-98 (2d Cir. 1973), a warning echoed in the opinion of the three Justices dissenting from the denial of certiorari in that case, 416 U.S. 995 (1974), the view that the double jeopardy clause requires joinder at a single trial of offenses arising out of a single transaction still does not command a sufficient number of Justices to trigger a grant of certiorari to consider the issue. *E.g.*, *Stewart* v. *Iowa*, 44 U.S.L.W. 3227 (U.S. October 14, 1975) (Justices Brennan, Douglas and Marshall dissenting from the denial of certiorari.) Moreover, it is not at all clear that the failure to *indict* Evans at the same time for all possible crimes arising from his possession of the travelers checks would offend against even Mr. Justice Brennan's views of the protection of the double jeopardy clause, so long as Evans were *tried* for all the offenses at the same time.

"moving as, a part of, or . . . constitute interstate or foreign commerce," 18 U.S.C. § 2315, a requirement wholly absent from the original indictment. The original indictment, on the other hand, would require proof that the checks had been stolen from a bank which was properly insured by the appropriate Federal agency and that the defendant knew that the checks were the proceeds of a bank theft or robbery. 18 U.S.C. § 2113(c). See *United States* v. *McCall, supra; United States* v. *Nathan, supra.* Furthermore, to a much greater degree than the narcotics statutes involved in *Blockburger* and *Gore*, the statutes underlying these two indictments are aimed at wholly different and distinct Federal policies. Section 2315 follows the statute prohibiting the interstate transportation of stolen property (18 U.S.C. § 2314) and is intended to cover the knowing possession of a wide variety of stolen property and goods which have moved in interstate commerce. Section 2113(c) is part of the bank robbery and theft statute, 18 U.S.C. § 2113, aimed at bank robberies, the use of weapons during bank robberies, bank larcenies, and the possession of proceeds from bank larcenies. It is even truer here than in *Gore* that the "penal laws [under which defendant has been charged] have different origins both in time and in design." *Gore* v. *United States, supra,* 357 U.S. at 390.

Congress having enacted two separate and distinct criminal statutes, Evans could be charged with violations of both, though based on a single course of conduct. Since his conduct as alleged in the original and superseding indictments constituted two separate offenses as a matter of law, there has been no violation of his double jeopardy rights arising from his subsequent indictment for violation of 18 U.S.C. § 2315 in the superseding indictment, whatever the significance of his invalid plea of guilty to the charges in the first indictment. Indeed, the foregoing makes clear that Evans could have been tried and convicted on the superseding indictment even

if the Court had entered judgment upon an entirely sufficient plea of guilty by Evans to the first indictment, or, alternatively, even if Evans had been tried and acquitted on the first indictment. See *United States* v. *Cioffi, supra.*

POINT III

The trial court correctly ruled that prosecution of the defendant following the reinstatement of a plea of not guilty did not violate his Fifth Amendment protection against double jeopardy.

Even if interlocutory appeal were permissible, and even if the two indictments in this case charged the "same" offense, thus triggering at least a threshold double jeopardy issue, defendant's position would still be untenable.

The Government and the defendant are in agreement that Judge Wyatt's acceptance of the guilty plea occurred solely because the defendant, his attorney, the Assistant United States Attorney, and the Court were unaware of the fact that the defendant had denied an essential element of the crime to which he sought to plead guilty. It is also undisputed that that defect—first pointed out informally by defense counsel—rendered the plea and its acceptance voidable as a matter of law. *United States* v. *Tavoularis, supra*, 515 F.2d at 1074. Not only was the Court's action in setting aside the guilty plea and restoring the plea of not guilty legally mandated, since there was no "factual basis for the plea," Rule 11, Fed. R. Crim. P., but it almost certainly would have been a denial of due process to have proceeded to enter judgment and impose sentence once it was realized that the defendant

had not in fact admitted all the elements of the crime charged. *United States ex rel. Metz* v. *Maroney*, 404 F.2d 233, 237 (3d Cir. 1968), *cert. denied*, 394 U.S. 949 (1969). Nonetheless, Evans, seeking to profit by his defective plea and the oversight of his own attorney, the Government and the Court, now contends that it would violate his double jeopardy protection to proceed to trial on the superseding indictment. His argument, without legal or logical support, comes down to the proposition that the mere acceptance of a guilty plea, voidable at the very least for non-compliance with Rule 11 of the Federal Rule of Criminal Procedure, forever immunizes the defendant with respect to the criminal transaction underlying the charge to which the plea was entered.*

Double jeopardy protection does not fly in the face of common sense. There is absolutely no violation of defendant's constitutional rights when the court does what the law requires it to do for the benefit of the defendant and vacates its earlier acceptance of a plea which was voidable on appeal because it lacked a factual basis, at least where the plea is set aside prior to the entry of the judgment of conviction. Rule 11, Fed. R. Crim. P., care-

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* As a preliminary matter, it is difficult to see how the vacating of the plea and the superseding indictment have any connection for double jeopardy purposes. The return of the superseding indictment played no part in the trial court's order to vacate and was not relevant to his duty under Rule 11. The defendant's jeopardy on the first indictment arose, if at all, only because and to the extent that the trial court accepted a guilty plea which was invalid under Rule 11. Had the Court applied Rule 11 in the first instance there could not have been jeopardy on the first indictment and the superseding indictment would not possibly have been subject to the attack now made. That the trial court was lead into error by the ignorance of the defense and the Government should hardly be a matter of constitutional consequence once the matter was put right.

fully provides that judgment shall not be entered on a guilty plea—whether the plea was earlier accepted by the judge or not—unless the judge is satisfied that there is a sufficient factual basis for the plea:

> "The court may refuse to *accept* a plea of guilty, and shall not *accept* such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not *enter a judgment* upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." (emphasis supplied).

While the court may *accept* an offered guilty plea once it finds that it was made voluntarily and with understanding of the nature and consequences of the plea, under the Rule it may not *enter judgment* upon a guilty plea unless it is satisfied that there is a sufficient factual basis. If this difference in wording has any significance at all—and it must be assumed that it is no mere accident—then it must mean that the court may refuse to enter judgment on an earlier accepted guilty plea if the court is not satisfied then that there is an adequate factual basis. This Court has expressed its agreement in *Irizarry* v. *United States*, 508 F.2d 960, 967 n.7 (2d Cir. 1974):

> "The Rule [Rule 11, Fed. R. Crim. P.] refers to not entering a judgment, rather than not accepting a plea, unless there is a factual basis for the plea. . . . The Rule permits the court to review the facts at the time of sentencing, and to reject a previously accepted plea if the facts developed in the presentence report or elsewhere tend to cast doubt on the plea's factual basis."

See also Stewart v. *United States*, 300 F. 769, 776-77 (8th Cir. 1924).*

The unmistakable meaning and intent of Rule 11 is that the acceptance of a guilty plea is conditional at least until judgment is entered by the court, because until that time the court is explicitly authorized to consider whether there is a sufficient factual basis for the plea.** Manifestly, that authorization would be meaningless unless the court were permitted to vacate its acceptance of the plea prior to judgment in the event that it is not satisfied that there is an adequate factual basis. In other words, the logic of Rule 11 leads inescapably to the conclusion that where a court vacates a guilty plea prior to judgment, the defendant is restored to a position of *status quo ante*: it is as if his guilty plea had never been accepted. Furthermore, not even the defendant in the present case disputes the Government's right to file a superseding indictment once the defendant is in the same position as he was prior to acceptance of his guilty plea.*** *DeMarrias* v. *United States*, 487 F.2d

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* To be sure, it could be argued that the Court's actions in the instant case violated the double jeopardy clause despite being specifically authorized by Rule 11. The Government submits, however, that there is at least a presumption that the rules of procedure promulgated by the Supreme Court are not unconstitutional, and they should be construed so far as possible to be consistent with constitutional requirements.

** While we submit that Rule 11 by its express terms authorizes what Judge Wyatt did below, we do not mean to suggest that entry of judgment would have necessarily foreclosed the action Judge Wyatt took below. That issue is, of course, not presented here.

*** The fact that defendant withheld his consent from the court's setting aside of the guilty plea has no effect on these conclusions. Not only does Rule 11 clearly give the court exclusively the power to consider the adequacy of the factual basis

[Footnote continued on following page]

19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). Evans cannot complain on the ground that the superseding indictment recast the charge in a way which made his knowledge of the specific origins of the stolen travelers checks irrelevant. Cf. *United States* v. *Wilner*, Dkt. No. 74-1955 (2d Cir., September 10, 1975) slip op. at 6114-6115.

In *United States ex rel. Metz* v. *Maroney*, *supra*, the defendant had been indicted for murder and pleaded guilty. Then, following State statutory procedure, the court conducted a hearing to determine the appropriate degree of the offense, during which the defendant testified that the killing was accidental. Thereupon, the trial court set aside the earlier plea of guilty—without defendant's consent—and the defendant was tried and convicted. The Court of Appeals, in reversing the grant of habeas corpus on double jeopardy grounds, held:

> "In these circumstances, the subsequent requirement that the accused stand trial as on a plea of not guilty did not violate the constitutional prohibition against double jeopardy. The situation here was analogous to that which arises when some occurrence during a trial leads the judge reasonably to conclude that it would be unfair to the accused to proceed and that justice requires that a mistrial be declared and a new trial ordered without regard to the wishes of the accused." *Id.* at 236.

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until the time of judgment, but in the present case the defendant's purpose in withholding consent was obviously to have it both ways: if the court set aside the guilty plea *sua sponte* he could assert double jeopardy, as he has done; if the court entered judgment upon the defective plea, he could successfully attack it on direct appeal. It is for this latter reason that defendant's righteous assertion that "[i]t was not appellant who requested his plea to the former indictment be withdrawn; he was ready for sentence on June 19," Br. 13, is a rather hollow one.

In an observation relevant to this case, the Court of Appeals went on to observe:

> "In the present case, it might well have constituted a denial of due process of law to proceed to sentence the accused for murder on a guilty plea once it appeared that the accused did not in fact admit to felonious conduct and indeed claimed that the shooting was accidental . . . Certainly, the conclusion of the trial judge that fairness to the accused dictated a trial . . . was reasonable and was made in the interest of justice." *Id.* at 237.

Similarly, in *United States* v. *Wagner*, 256 F. Supp. 574 (D. Conn. 1965), defendant was indicted for embezzling and pleaded not guilty; then the defendant pleaded *nolo contendere* to an information charging the same offense and the plea was accepted by the court, at which time the indictment was dismissed. On the date of sentencing, defendant denied an essential element of the offense, whereupon the court set aside the plea of *nolo contendere* and a plea of not guilty was entered to the information. Thereafter, defendant was indicted for the offense. The court completely rejected the claim of double jeopardy:

> "It would imperil the integrity of the rule [Rule 11, Fed. R. Crim. P.] to constrain a judge from erasing that finding [of guilt] shortly after it had been entered for the purpose of protecting the interests of a defendant who protested his innocence.
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> . . . . .
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> "Once the plea was withdrawn, the finding erased, and a plea of not guilty entered, there was nothing on the record to embarrass or adversely affect the defendant thereafter. Jeopardy cannot be said to attach in such a situation . . .

> "The presence of a plea of not guilty to the indictment does not constitute jeopardy and a second indictment will not be double jeopardy." *Id.* at 576.

These common-sense conclusions are fortified by the Supreme Court's recent decision in *Illinois* v. *Somerville*, 410 U.S. 458 (1973).* The defendant had been indicted by an Illinois grand jury for theft. He pleaded not guilty and a trial jury was impaneled and sworn. At that point, the prosecutor realized that the indictment was defective on its face because it failed to allege defendant's intent to permanently deprive the owner of his property. Under Illinois law this defect was not curable by amendment, it could not be waived by defendant's failure to object, and it could be asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction. The trial court granted the prosecution's motion for a mistrial and the grand jury returned a second, proper indictment, upon which the defendant was tried, convicted and sentenced. The United States Supreme Court reversed the holding of the Court of Appeals that defendant's petition for habeas corpus should have been granted on double jeopardy grounds. First, the Court reaffirmed that there were no mechanical formulas by which to judge the availability of double jeopardy protection, that the trial judge enjoys broad discretion in such matters, and that the firmest guide is that of Mr. Justice Story in *United*

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* While *Somerville* and like cases deal with mistrials rather than the vacating of pleas, we submit that the double jeopardy principles involved are the same. For that reason, we believe it unnecessary for the court to consider whether jeopardy attaches in the guilty plea context when judgment is entered or earlier when the plea is entered. For an ambiguous response to this question, see *United States* v. *Jerry*, 487 F.2d 600, 606-07 (3d Cir. 1973).

States v. *Perez*, 9 Wheat. (22 U.S.) 579, 580 (1824), that retrial would be permitted, even if there has been a technical attachment of jeopardy, whenever "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." The Court found that that standard permitted the retrial of the defendant following the discovery of a defect in the indictment, despite the attachment of jeopardy, and made these observations about the permissibility of retrial generally:

> "While virtually all of the cases turn on the particular facts and thus escape meaningful categorization . . . it is possible to distill from them a general approach, premised on the 'public justice' policy enunciated in *United States* v. *Perez*, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." 410 U.S. at 464.

The Supreme Court rejected defendant's double jeopardy claim because it was perfectly obvious that if he had been convicted on the first indictment the conviction would have been overturned on appeal and the case would have been returned to the lower court for a new trial, at which time the prosecutor would have simply retried him on a new, corrected indictment. *Accord, United States* v. *Velaz-*

quez, 490 F.2d 29, 34 (2d Cir. 1973).* Under settled law

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* Relying on other language in *Somerville*, Evans attacks the order vacating his guilty plea because it gave the prosecutor an opportunity to strengthen a case which was otherwise deficient in proof of defendant's knowledge that the checks had been stolen from a bank, by securing a superseding indictment under a statutory provision which did not make such knowledge an element of the crime. We respectfully submit that his argument is without merit. Such cases as *Downum* v. *United States*, 372 U.S. 734 (1963), on which Evans principally relies for his argument, have found that there exists no "manifest necessity" where, as in *Downum*, the order is entered for the purpose of giving the Government a second chance to try the defendant with a sharper case. In *Downum* the first jury was discharged because the Government had not secured the presence of a key witness. The *Downum* principal is inapposite here, for it was not the unavailability of a crucial government witness but a deficiency in the defendant's voluntarily tendered and erroneously accepted guilty plea which *required* the Court under Rule 11 to vacate the guilty plea and return the case to where it stood before the plea was offered.

That the trial court's action may have resulted in permitting the Government to correct a pre-existing potential deficiency in the strength of its proof is not, we respectfully submit, controlling. The Court below was required, in the interest of the defendant and under the compulsion of Rule 11, to vacate the plea. That this might provide an opportunity for the Government to strengthen its case did not render the order any less required under the Rule. Any time, for example, that a mistrial is declared for "manifest necessity", the opportunity to try the defendant over may, and often will, have the collateral consequence of permitting the Government to secure new witnesses or to otherwise strengthen its case. That fact alone, despite Evans' argument, has never been held to be a ground for holding the order of a mistrial improper if entered upon a valid ground, whether with or without the consent of the defendant. *United States* v. *Gentile*, *supra*, slip op. at 244-51. *See, generally, United States* v. *Tateo*, 377 U.S. 463 (1964); *Gori* v. *United States*, 367 U.S. 364 (1961). Of course, unlike *Gori*, the trial judge's order vacating the plea in this case was not a questionable exercise of discretion but a required remedy of the error of accepting in the first place Evans' plea of guilty in violation of Rule 11.

that would have been no violation of double jeopardy protection. *Bryan* v. *United States*, 338 U.S. 552 (1950). The same applies to the instant case. Aside from the possibility, noted above, that the trial court probably would have violated the due process clause had it not set aside Evans' guilty plea, the conviction entered on such a plea certainly would have been vacated upon appeal by the defendant and the case would have been returned to the District Court for trial on the merits. It is folly to urge that Judge Wyatt deprived the defendant of his rights by vacating a plea now which would have had to be vacated later—after defendant went to the expense and trouble of attacking his conviction, perhaps after he had served part or all of a sentence which could have included imprisonment.

The very substantial misreading of the *Somerville* case in defendant's brief (pp. 14-19) is unfortunately representative of defendant's analysis of other relevant decisions.* In the first place, the defendant, in discussing

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* For example, the defendant's reliance on *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), the case in which he says the Second Circuit "said it squarely," Br. 19, is wholly misplaced. In *Sabella*, defendants were convicted for committing crimes which, at the time committed, carried absolutely no penalty, as a result of a Congressional inadvertence in drafting the statute. By the time the defendants were convicted the statute had been amended to include penalties. The trial court imposed sentences which were authorized by the time of trial, but had not been at the time the crimes were committed. The defendants discovered this while they were serving time and applied for habeas corpus. The Government, realizing what happened, moved for an order to set aside the sentences as being not authorized. The court not only entered such an order but also set aside the convictions and dismissed the indictment. Thereafter, a new indictment was returned and defendants were again convicted. This Court held that this violated the double jeopardy clause because it was *only the sentences* which were void in the first prosecution, not the

[Footnote continued on following page]

Somerville and elsewhere, repeatedly refers to the Government's "defective indictment" in this case. *See, e.g.*, Br. 16-19, 27. There was nothing defective about the indictment in this case—it charged that the defendant possessed travelers checks which had been taken with intent to steal from a named Pennsylvania bank, "*knowing the same to have been so taken.*" The only "defect" was in the factual basis for defendant's plea. Then the brief argues from *Somerville's* analysis, 410 U.S. at 467, of *United States* v. *Ball*, 163 U.S. 662 (1896), that once a defendant has been convicted, the double jeopardy clause bars retrial in every instance. Br. 16-17. Although even if true this would not affect the present case, *Ball* itself belies this contorted conclusion. There, after three men had been indicted for murder, two were convicted and one was acquitted. On appeal, the two convictions were reversed because of a defect in the indictment. A proper indictment was then returned against *all three defendants—including the one acquitted*, and this time all three were convicted. The Supreme Court affirmed the convictions of the two previously convicted defendants who had been retried and convicted again, but reversed on double jeopardy grounds as to the one earlier acquitted. The *Ball* case makes good sense and good law, but it has nothing to do with this case, and it certainly does not support the position of the defendant.

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convictions. Therefore, when the court on its own motion went beyond vacating the sentences and set aside the valid convictions as well, the Government was precluded from charging the defendants with the same offense. This Court went on to note that defendants' habeas petition did not result in their waiver of double jeopardy protection as to the *convictions* because their petition attacked only the sentences. If defendants had successfully attacked their *convictions* as having been improperly entered, they would have waived double jeopardy protection as to them as well. Thus, *Sabella* unequivocally supports the Government's position in the present case.

Finally, the Supreme Court has stated the purpose and nature of double jeopardy protection in the following terms:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957).

As is clear in reading this description of the high purposes behind the double jeopardy clause, there is nothing in the fundamental nature or purposes of double jeopardy protection which calls for a bar to the prosecution of Frank Evans. Indeed, there is a definite air of unreality to defendant's claim: he offered to plead guilty, he attempted to provide the factual basis for that plea but failed; if judgment had been entered on the plea and defendant sentenced, the conviction would have been overturned and the defendant tried, on either the original or a superseding indictment; Judge Wyatt, discovering the failure of factual basis, set aside the guilty plea prior to the entry of judgment and sentence and restored defendant's plea of not guilty. Nontheless, the defendant claims that his rights have been violated and prosecution of him should be forever barred.

The Government submits that the court's action was not only perfectly proper but legally and perhaps constitutionally mandated for the protection of the fundamental rights of the defendant. The not guilty plea having been properly reinstated, there was nothing improper about the Government's prosecution of the defendant under a superseding indictment.

CONCLUSION

The appeal should be dismissed or, in the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard J. Hoskins being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28 day of Oct., 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Lubin Gold & Geller
299 Broadway
New York NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard J. Hoskins

Sworn to before me this
28th day of October, 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977